Nos. 08-0856-ag(L), 08-1094-ag(XAP)

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

CONSOLIDATED BUS TRANSIT, INC.,

Respondent/Cross-Petitioner

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATUTES

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Regulations

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") for enforcement, and on the cross-petition of Consolidated Bus Transit, Inc. ("CBT"), for review, of a Decision and Order of the Board issued against CBT. The Board had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Decision and Order issued on August 31, 2007, and is reported at 350 NLRB No.

82. (JA 23-64.)[1] The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)); the unfair labor practices occurred in New York, New York.

The Board filed its application for enforcement on February 25, 2008, and CBT filed its cross-petition for review on March 7, 2008. Both the application for enforcement and the cross-petition for review were timely; the Act places no time limit on the institution of proceedings to enforce or review Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its numerous uncontested findings that CBT violated Section 8(a)(1) and (3) of the Act by engaging in discriminatory and coercive acts against its employees because of their union and protected concerted activities.

2. Whether substantial evidence supports the Board's finding that CBT violated Section 8(a)(3) and (1) of the Act by discharging employee Juan Carlos Rodriguez in retaliation for his union and protected concerted activities.

3. Whether the Board acted within its broad remedial discretion in ordering a conditional reinstatement and limited backpay remedy for Rodriguez.

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[1] "JA" references are to the joint appendix filed by CBT. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to CBT's opening brief.

STATEMENT OF THE CASE

Acting on unfair-labor-practice charges filed by employees Jona Fleuimont and Jose Guzman, and by Teamsters for a Democratic Union ("TDU"), the Board's General Counsel issued a consolidated complaint alleging, in relevant part, that CBT violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by subjecting certain employees to closer supervision by following and videotaping them while on their routes; by interrogating employees about their protected concerted and union activities; and by threatening employees with suspension, discharge, arrest and unspecified retaliation because they engaged in protected concerted and union activities. The complaint also alleged that CBT violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §§ 158(a)(3) and (1)) by issuing written warnings to employees; by singling them out for testing; and by suspending and discharging them because of their union and other protected concerted activities.[2]

Following a hearing, the administrative law judge issued a decision and recommended order to which the parties filed exceptions, cross-exceptions and

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[2] The complaint further alleged that Local 854, International Brotherhood of Teamsters AFL-CIO ("Local 854") violated Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) of the Act by threatening employee Jona Fleurimont with assault because of his protected concerted and union activities. The Board found that the Local 854 violated the Act as alleged, and ordered Local 854 to cease and desist from threatening employees with assault because they engaged in protected concerted or union activities and to post an appropriate notice. (JA 25, 27.) This issue is not before the Court, however, because Local 854 has fully complied with the Board's Order by posting a remedial notice.

answering briefs. Thereafter, the Board issued a decision and order affirming most of the judge's rulings, findings and conclusions as modified, and adopting the recommended order as modified. The Board's pertinent findings and its conclusions and order are summarized below.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

From its headquarters in Brooklyn, New York, CBT provides school bus transportation services to the New York City Department of Education ("DOE"), and to private schools in New York City. (JA 24, 30.)[3] CBT buses operate out of several "yards" in Brooklyn and the Bronx; only one of the Bronx yards, located at Zerega Avenue, is involved in this case. (JA 30; 24, 405-06.)

Two unions--Local 854, International Brotherhood of Teamsters, AFL-CIO ("Local 854"), and Local 1181, Amalgamated Transit Union (ATU) ("Local 1181")--represent CBT's approximately 2000 bus drivers and escorts. (JA 24, 30.) Local 854 represents about 1000 of those employees, 600 of whom work at the yards in the Bronx. (JA 30; 307-09.) The latest collective-bargaining agreement

[3] CBT owns two other bus companies, Borough Transit, Inc., and Lonero Transit, Inc., both of which do business under the corporate name Consolidated Bus Transit.

between CBT and Local 854 was effective from July 1, 2002 through June 30, 2005. (JA 30; 274-308.)

B. Employee Juan Carlos Rodriguez Leads a Group of Drivers Seeking Changes in Their Working Conditions; They Seek the Assistance of Teamsters for a Democratic Union and Hold Several Employee Meetings; They Decide to Petition for a New Shop Steward Election

In early 2002, a group of Local 854-represented drivers from the Zerega yard, led by Juan Carlos Rodriguez, and including Jose Estevez, Jona Fleurimont, Jose Guzman, Victor Irizarry, Renzo Lopez, Raphael Perez, and Jose Naranjo, began to meet and discuss their dissatisfaction over certain workplace issues. Among their concerns was Rodriguez's belief that CBT paid lower wages and benefits under Local 854's contract than it paid under Local 1181's. (JA 24, 31-32; 527-28.) Rodriguez also contacted, sought assistance from, and joined Teamsters for a Democratic Union ("TDU"), an organization comprised of rank-and-file members of the International Brotherhood of Teamsters whose objective is to reform the International Union. (JA 24, 29, 31, 32; 528, 771, 1074-75.)

In March and April 2002, Rodriguez organized and led four to six meetings, each of which was attended by approximately 75 employees. (JA 530-31.) By then, drivers Guzman, Fleurimont, and Estevez had also joined TDU and, at the meetings, the TDU activist employees distributed TDU literature on employee rights. They discussed wages, and their dissatisfaction with Local 854's

representation. They also decided to petition Local 854 to hold an election for a new shop steward, and they selected driver Jona Fleurimont as their candidate. (JA 24, 31-32; 530-31.) Previously, Local 854's leadership had appointed the shop steward. (JA 786.)

C. TDU Activist Employees Collect Signatures for a Shop Steward Election Petition; CBT Managers Observe the Petitioning Activities; Chief Operations Manager Anthony Strippoli Questions Employee Estevez About Who Initiated the Petition and Threatens to Have that Person Arrested

In May 2002, Rodriguez, Guzman, Fleurimont and Estevez began collecting signatures for the shop steward election petition. They conducted this activity at the entrances to the Zerega yard, in full view of Terminal Manager Tommy Doherty's second-floor office windows. (JA 31-32; 533-34, 537, 998.)

Several management personnel observed the employees' petitioning activities. Doherty watched them from his office, and he once came into the yard, standing about 20 feet from where Rodriguez, Guzman, Lopez and Naranjo were collecting signatures for about 10 minutes. (JA 33; 535-36, 543-46, 777, 999-1000.)

Chief Operations Manager Anthony Strippoli, who visited the Zerega yard every day at 5:30 a.m., also observed the employees' petitioning. On one occasion, Strippoli approached Estevez as he was collecting signatures and ordered him to report to Strippoli's Brooklyn office, where he asked Estevez who was

behind the shop steward petition. (JA 33, 40, 44-45; 719-21, 749, 186.) Strippoli stated that by circulating the petition, the employees were "causing trouble" and "trying to hurt" CBT, that he "was going [to ask the drivers] one by one" until he found out who had made the petition and, that when he did, the instigators would be arrested. (JA 33, 40; 183-88, 721-24, 749.)

D. Rodriguez Leads an Employee Meeting at Zerega Yard and Presses Local 854 to Schedule the Shop Steward Election; CBT Managers Observe the Meeting and Interfere with Employee Posting and Distribution of Flyers Favorable to Fleurimont's Shop Steward Candidacy

In early June 2002, Rodriguez, Guzman, and Fleurimont led an employee meeting of 60 to 70 employees at Zerega yard. The TDU activist employees invited Local 854's president Daniel Gatto to the meeting, and Rodriguez pressed Gatto to quickly schedule the shop steward election. (JA 33; 328-29, 539-41.) Fleurimont criticized Local 854 for not defending workers from company harassment, adding that employees were tired of the working conditions and wanted change. Fleurimont then led the assembled employees in a responsive chant of "We want change." (JA 33, 45; 539-41, 784-86, 1078.)

Local 854 scheduled the shop steward election for June 19, 2002. (JA 37.) Rodriguez, Guzman, Fleurimont and Estevez distributed and posted flyers supporting Fleurimont's candidacy for the shop steward position in the drivers'

room, in the cafeteria, in the entrances and office, on light poles and the walls at Zerega yard, and on cars parked at the main gate. (JA 33; 548-53, 787-88.)

CBT showed its opposition to Fleurimont's shop steward candidacy by removing all his campaign flyers posted at the facility. (JA 34; 550-52.) However, CBT did not remove flyers supporting incumbent shop steward Ronald Nigro's bid to retain that position, which were posted throughout the Zerega yard facility. (JA 550-51, 777-78.) On another occasion, Strippoli confronted Rodriguez, Guzman, and Fleurimont as they were distributing leaflets and told them he did not want leaflets distributed in the yard. (JA 33; 552-53, 777-78, 1019-20.)

E. CBT Follows and Videotapes TDU Activist Employees on Their Routes; CBT's President Curcio Insults Employee Fleurimont and Issues Him Three Unsubstantiated Warnings

On June 3, 2002, Director of Safety Joseph Antoci and Safety Officer Bill Ronecker followed and videotaped shop steward candidate Fleurimont along his bus route. CBT had never followed Fleurimont before. (JA 43; 1083.) Two days later, on June 5, Antoci and Safety Officer Vito Mecca again followed Fleurimont's bus. At the end of the route, Antoci asked for Fleurimont's identification and driver's license. (JA 34, 43, 44; 1080-84, 1171.)

That same day, June 5, 2002, CBT summoned Fleurimont to a hearing in Brooklyn, where President Joseph Curcio called Fleurimont a "troublemaker," and asked what more could Fleurimont want since CBT already paid him $800 weekly.

(JA 43, 44, 45; 1086-89.) Director of Safety Antoci then issued Fleurimont three written warnings, allegedly for infractions committed on May 13, June 3, and June 5. CBT had never disciplined Fleurimont before, and it never substantiated these warnings. (JA 43, 45; 981, 1171.)

CBT also followed and videotaped employee Estevez on three separate occasions in June 2002. On one of those occasions, Antoci told Estevez that he had done well and that they would use the video "to show other drivers how to do things." (JA 42, 44; 742-43.) On another occasion, Safety Officer Mecca told Estevez that CBT had ordered Mecca to follow Estevez. (JA 42-43, 44; 744, 749.) Estevez, who had been a driver at CBT since 1993, had a "spotless" driving and disciplinary record, and prior to his union activism, CBT had never followed him. (JA 42; 740-41.)

F. Employees Elect Fleurimont as the Shop Steward; Fleurimont Selects Guzman as the Assistant Shop Steward; Strippoli Questions Guzman about His Union Activities

On June 19, 2002, Local 854 conducted the shop steward election. Fleurimont won the election, and he selected Guzman as the assistant shop steward. (JA 32; 312, 316-17, 372, 553, 1080.)

On June 20, 2002, Strippoli asked Guzman who won the election. Guzman replied that Fleurimont had won. Strippoli said Guzman was a "phony," and that he went behind peoples' backs gathering petitions. Strippoli added that it was

illegal to distribute flyers and petition on CBT's property. Guzman contended that it was illegal to do so only during working hours. Strippoli said Guzman should talk to his "lawyers," referring to the lead TDU activist employees, whom he said had been "making trouble for everyone." Strippoli added that they, the TDU activist employees, "were lucky that he didn't see who was doing it, because he would have thrown [them] out no matter who." (JA 34; 793-94.)

G. Employees Distribute and Post Flyers Opposing Certain Working Conditions; CBT Suspends Fleurimont and Guzman for Posting Those Flyers and Issues a New Rule Prohibiting "Unauthorized" Postings

In mid-September 2002, Rodriguez and the other TDU activist employees openly distributed and posted numerous flyers at the Zerega yard. The flyers discussed a range of topical workplace issues, such as the activists' efforts to file a grievance challenging CBT's decision to assign employees routes for the United Cerebral Palsy Foundation, in addition to their regular DOE routes, without paying the selected employees for the "double run" assignments. Other flyers addressed CBT's suspension of employees for union activities, an announcement that it was "time to turn things around at [CBT]," and information about TDU's upcoming regional conference. (JA 36; 167-68, 561-62, 565, 573, 818-20, 821, 1004-10.)

CBT removed those flyers and replaced them with a notice prohibiting "unauthorized" postings unless the posters first obtained CBT's consent. (JA 337, 577, 829, 169.) Previously, employees had routinely posted all types of flyers in

the drivers' room, including notices for trips to Atlantic City, invitations to parties, and notices for personal vehicles and other items for sale. (JA 35: 830-32.)

On September 30, 2002, CBT summarily suspended Guzman and Fleurimont for 1 day, allegedly for posting flyers on the wall of the drivers' room. (JA 35; 151, 334, 811-14, 817-18, 1105-06, 1109, 1175.) At a grievance over the suspensions, CBT admitted that the suspensions were "unjust," and it apologized to Guzman and Fleurimont, and made them whole. (JA 36, 60, 61; 153, 168, 334-36, 817, 1110, 1164.)

H. CBT Refuses to Allow TDU Activist Guzman in the Office to Perform His Shop Steward Duties; Guzman and Fleurimont File Unfair Labor Practice Charges Alleging that CBT Broke Fleurimont's Car Windows in Retaliation for Fleurimont's Protected Activities; President Curcio Accuses TDU Activist Employees of Extortion and Intimidation, Calls Them "Gangsters," Threatens Them with Arrest, and Suspends Guzman

In addition to their regular bus routes, CBT drivers are occasionally required to drive pupils on field trips. The DOE designates the drivers for each field trip based exclusively on proximity of the field trip to the selected drivers' regular route. Once CBT receives the daily list of field trips from the DOE, the shop steward is responsible for placing that information on the "trip cards" of the appropriate drivers. (JA 37-38; 342-44, 356, 438.) Traditionally, CBT has permitted the shop stewards to use a second-floor office at Zerega yard to perform the field trip assignments and other union duties. In November 2002, however,

CBT refused to allow Guzman to use the second floor office to perform his duties connected to field trip assignments, insisting instead that Fleurimont should handle that responsibility. (JA 38; 341, 1121-24.) Local 854 filed a grievance over that action, and CBT eventually reversed its position. (JA 38; 154, 341-42.)

Meanwhile, on November 18, 2002, someone broke all the windows of Fleurimont's car while it was parked near the Zerega yard. (JA 38.) On November 19, Guzman and Fleurimont filed various unfair labor practice charges with the Board alleging that CBT and Local 854 were responsible for the vandalism to Fleurimont's car in retaliation for his protected concerted activities. (JA 36; 366.) On November 20, Rodriguez, Guzman, Figueroa and Naranjo collected money at Zerega yard to help Fleurimont pay for car repairs. Doherty watched them from his second-floor office window. (JA 588-89, 1007.)

On November 21, 2002, CBT summoned Guzman and Fleurimont to its Brooklyn office for a disciplinary hearing. (JA 38; 347, 843-44, 1124-26.) CBT's President Curcio presented Guzman with three letters allegedly written by employees, who accused Guzman of favoritism and unfairness in making field trip assignments. (JA 38; 847-48.) Curcio called Guzman and Fleurimont "gangsters," and accused them of extortion in the assignment of field trips. Pointing at Guzman, Curcio added that the TDU "group" was intimidating employees, and he threatened to call the police to arrest them. He told Local 854's President Gatto,

who was at the hearing, that Gatto should "clean his house" because "these guys are trouble." (JA 38-40; 847-49, 1125-27.) CBT then issued Guzman a 5-day suspension, which it later changed to a 6.5-day suspension. (JA 38, 848, 855-57.)

Local 854 filed a grievance over Guzman's suspension, and successfully arbitrated it. CBT was ordered to make Guzman whole for the suspension. (JA 38, 40.)

I. Estevez, Fleurimont, Guzman, and Rodriguez Publish an Article Critical of CBT in TDU's Newsletter, and They Distribute Numerous Flyers Criticizing CBT; Rodriguez and Other TDU Activists Collect Money For Discharged Employee Fleurimont and Solicit Signatures For a Petition Alleging Fleurimont's Discharge was an Unfair Labor Practice

The November/December bimonthly issue of the TDU newsletter contained an article signed by Estevez, Fleurimont, Guzman, and Rodriguez that harshly criticized CBT. (JA 52; 603-04, 179.) The article, which was distributed at Zerega yard, accused CBT of "retaliation, sometimes violent" in the form of slashing Estevez's tires, suspending Fleurimont and Guzman, smashing all the windows on Fleurimont's car, and threatening to assault Fleurimont. (JA 179.)

Between December 10, 2002, and January 20, 2003, Rodriguez, Lopez, Guzman, and Figueroa continued to openly distribute flyers at Zerega yard. One of those flyers stated that CBT treated Local 854-represented employees as second-class citizens compared to Local 1181-represented employees. It praised Fleurimont and Guzman as new shop stewards who would defend employee rights

"without seeking personal benefits." In addition, the flyer urged employees to join the TDU's organizing efforts. (JA 52; 596-97, 1008, 1010, 172.) Another flyer, captioned "CBT under investigation for violating federal law," discussed allegations in unfair labor practice charges filed with the Board against CBT and Local 854. (JA 609-11, 1013-14, 181.)

On January 29, 2003, CBT discharged Fleurimont.[4] Fleurimont was denied unemployment benefits. (JA 37; 611, 1014-15.) In early February 2003, a number of employees, including Rodriguez, Figueroa, and Naranjo, openly collected money for Fleurimont at Zerega yard. (JA 37, 45; 549, 1017.) Also in early February, Rodriguez and Estevez stood at the entrance to the yard and collected signatures on a petition alleging that Fleurimont's discharge was an unfair labor practice. (JA 37, 45; 612-13.)

J. Safety Officer Mecca Follows and Videotapes Rodriguez While On His Route; Mecca Issues Rodriguez a Warning and Tells Rodriguez He Has "Orders From the Top to Penalize" Rodriguez

On February 14, 2003, Safety Officer Mecca followed and videotaped Rodriguez on his morning route. (JA 43; 615-17.) At the end of the route, Mecca told Rodriguez he had done a very good job, and had driven well, but that he had made a small mistake. (JA 43; 616-17.) Later that day, Rodriguez went to Mecca's office to view the videotape that Mecca took. It showed that the right

[4] Fleurimont's discharge is not an issue in this case. (JA 37.)

wheel of Rodriguez's bus had briefly touched the yellow dividing lines on the roadway. Mecca told Rodriguez that he did not consider this to be a serious matter, but that "he had orders from the top to penalize [Rodriguez]." He issued Rodriguez a written warning for a safety violation. (JA 43, 45; 616-17.)

K. CBT Administers New York State's 19A Biannual Driving Test to Rodriguez Less Than 5 Months After He Passed that Test; Rodriguez Fails and CBT Suspends Him

Under New York State law, CBT must administer the State's Article 19-A Biennial Behind the Wheel Road Test ("19A test") to each of its school bus drivers at the time of hire and every 2 years thereafter. CBT is free to administer the 19A test more frequently. The 19A test assesses how well a driver handles the bus on the open road and how well he is able to mechanically check the bus. (JA 24, 30; 478-79, 490.) Drivers who fail the test may not operate a school bus for at least 5 days and, during that time, they may retake the test. Drivers who fail a second test are disqualified from driving a school bus. The New York Department of Motor Vehicles administers any further testing, and issues re-certification, to a driver who fails twice. (JA 24, 30; 479-80, 490-95.)

On March 19, 2003, CBT summoned Rodriguez to take a 19A driving test after his morning run. Rodriguez failed the test, and CBT immediately removed him from driving his bus and suspends him. (JA 49; 71, 74, 624, 1020-21.) Rodriguez, who had most recently taken and passed the biannual test less than 5

months earlier, on October 31, 2002, asked Director of Safety Antoci why CBT had retested him before his 2-year period expired. Antoci stated that, if CBT wished, it could make a driver take the test everyday. (JA 656-57.)

On March 21, 2003, Rodriguez filed a grievance, alleging that his March 19 testing was in retaliation for his protected concerted activity. (JA 1035-42, 226.) Local 854's Secretary-Treasurer Ann Stankowitz asked Antoci about the reason for testing Rodriguez. Antoci explained that Rodriguez had an accident on June 21, 2002--four months before he passed his regularly-scheduled 19A test in October 2002--and a safety violation on February 14, 2003. (JA 50; 387, 389, 390.)

L. Rodriguez, Guzman, Fleurimont, and other TDU Activists Visit the DOE to Complain About Their Working Conditions; CBT Learns About the Employees' Visit and Calls the Employees "Gangsters," Threatens Them With Arrest, and Issues Them Written Suspensions

Also on March 21, 2003, approximately 12 TDU activist employees, including Rodriguez, Guzman, and Fleurimont, visited the DOE's office in Queens to complain about their working conditions. Specifically, they told DOE officials that CBT was following and videotaping them on their routes in reprisal for their protected activities; that Local 854 was repressive and controlled by CBT; that CBT had unfairly assigned them extra routes; and that CBT was unfairly subjecting them to unfair 19A testing and discharge. (JA 54-55, 56; 658-59, 756-

57, 902-04, 1063-64.) Rodriguez requested that DOE send someone to witness his 19A retest. (JA 54-55, 662.)

On March 24, 2003, Guzman, Estevez, Garces, and about seven other drivers, found notes on their trip cards summoning them to Brooklyn after their morning runs. (JA 55, 56; 208-10, 756-59, 905.) The employees met with Curcio, Strippoli, and other management personnel. (JA 54-55; 760, 908.) Curcio point-blank stated that he was "livid" that the employees had gone to the DOE to complain about CBT, and he asked which of the employees were involved. (JA 55; 760, 762, 907-08.) When none of the employees replied, Antoci photographed them. Curcio said he would take the pictures to the DOE to get the identification of the culprit employees who had attended the earlier meeting. (JA 55, 56; 396-98, 761, 908-09, 912.) Curcio called the employees "gangsters" and "terrorists." (JA 911-12.) He added that he was from Brooklyn and could also "play hardball." He then announced that he would place a "paper suspension" in the personnel file of the employees who had gone to the DOE because he had to make an example out of them. (JA 55; 400, 1633-34.)

M. Rodriguez Fails His 19A Retest, and CBT Discharges Him

On March 27, 2003, Rodriguez retook the 19A test. He failed. That very day, CBT discharged Rodriguez. Safety Director Antoci also told Rodriguez that he was disqualified from driving a CBT school bus, and that to obtain

recertification, the State's Department of Motor Vehicle must retest him. (JA 24, 49; 71, 74, 663, 669-70, 1043-50.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 31, 2007, the Board (Chairman Battista and Members Liebman and Schaumber) issued its unanimous Decision and Order, finding, in agreement with the administrative law judge, that CBT violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively interrogating Jose Estevez; by threatening Estevez with discharge; by threatening to have employees arrested for engaging in union activities; by threatening employee Jona Fleurimont with unspecified reprisals; and by interrogating, threatening, creating the impression of surveillance, and engaging in surveillance of employees who complained to the DOE.

The Board also found, in agreement with the judge, that CBT violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by singling out employees Fleurimont and Jose Guzman for discipline, by suspending them on September 30, 2002, and by suspending Guzman again on November 21, 2002; by subjecting employees to closer supervision by following and videotaping them on their routes; by issuing three written warnings to Fleurimont on June 5, 2002; by following and issuing a written warning to employee Juan Carlos Rodriguez on February 14, 2003; and by singling out Rodriguez for testing on March 19, 2003. (JA 25-26.) The Board also found, in disagreement with the judge, that CBT

violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employee Rodriguez in retaliation for his union activity.

The Board's Order requires CBT to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. (JA 26.) Affirmatively, the Board's Order requires CBT to make Jose Guzman and Jona Fleurimont whole, remove from its files any reference to the unlawful suspensions, and notify them in writing that this has been done and that the suspensions will not be used against them in any way. (JA 27.) The Board's Order also requires CBT to remove from its files any reference to the unlawful written warnings issued to Fleurimont and Juan Carlos Rodriguez, and notify them in writing that this has been done and that the warnings will not be used against them in any way. The Order further requires CBT to remove from its files any reference to the unlawful discharge of Rodriguez; to notify Rodriguez in writing that this has been done and the discharge will not be used against him in any way; and to offer him full reinstatement to his former job conditioned upon his demonstrating that he has reestablished his 19A certification; and to make him whole. (JA 27.) In addition to the posting of an appropriate remedial notice at its facilities in the Bronx and in Brooklyn, the Order requires CBT to provide the

Regional Director a sworn proof attesting to its compliance with the Order. (JA 27.)

SUMMARY OF ARGUMENT

This case involves CBT's attempts to thwart the union and concerted activities of a group of its employees led by Juan Carlos Rodriguez. Thus, from the moment it learned that those employees had affiliated themselves with TDU and were demanding an election for a new shop steward to handle their workplace grievances more effectively, CBT embarked on a systematic campaign to coerce those employees into ceasing their union activity, and to rid itself of the primary TDU supporters. Before the Court, CBT does not contest any of the Board's numerous findings that it violated Section 8(a)(1) of the Act by coercively interrogating employees, threatening them with discharge, arrest, and unspecified reprisals, creating the impression of surveillance, and engaging in surveillance of employees' union and protected concerted activities. CBT also does not contest the Board's findings that it violated Section 8(a)(3) and (1) of the Act by singling out TDU activist employees for discipline by suspending them, subjecting them to closer supervision by following and videotaping them on their routes, issuing them written warnings, and singling out Rodriguez for testing on March 19, 2003. Accordingly, the Board is entitled to summary enforcement of those findings.

In view of the animus demonstrated by those uncontested violations, particularly CBT's singling out of Rodriguez for testing based on an admittedly bogus warning, substantial evidence supports the Board's finding that CBT violated Section 8(a)(3) and (1) of the Act by discharging Rodriguez in retaliation for his union activity. Faced with the overwhelming evidence that its discharge of Rodriguez was motivated by union animus, CBT's sole contention is that Rodriguez was only temporarily disqualified from driving, not discharged, and therefore suffered no adverse action as a result of CBT's unlawful singling him out for testing. As the Board reasonably found, however, CBT specifically admitted in its answer to the complaint that it discharged Rodriguez on March 27, 2003, and CBT is bound by that admission. In any event, in light of the fact that Rodriguez's employment ended only because CBT admittedly singled him out for testing and unlawfully manipulated the testing schedule, CBT's effort to distinguish between "disqualified" and "discharged" is a distinction without a difference. Finally, CBT has failed to show that the Board's remedy of ordering conditional reinstatement and limited backpay for Rodriguez is in any way inappropriate.

STANDARD OF REVIEW

In general, "judicial review of the Board's order is quite limited." *NLRB v. Katz's Delicatessen*, 80 F.3d 755, 763 (2d Cir. 1996). *Accord NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Section 10(e) of the Act (29 U.S.C. § 160(e)) prohibits the Court from consider "any objection that has not been urged before the Board. Moreover, this Court has made clear that when an employer does not challenge in its brief the Board's findings regarding violations of the Act, those unchallenged issues are waived on appeal, and the Board "is entitled to summary affirmance of [its] unchallenged unfair labor practice findings." *NLRB v. Springfield Hospital*, 899 F.2d 1305, 1308 n.1 (2d Cir. 1990).

As to the contested findings, the Board's determination that an employer's discharge of an employee was unlawfully motivated is "conclusive" "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988). Moreover, where, as here, the Board "makes an order of restoration by way of [limited] backpay" and conditional reinstatement, the "order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric &*

Co. v. NLRB, 319 U.S. 533, 540 (1943). *Accord NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990); *see also Electrical Contractors, Inc. v. NLRB*, 245 F.3d 109, 122-23 (2d Cir. 2001).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS

Before the Board, CBT did not except to a litany of the judge's unfair labor practice findings. Because CBT failed to file exceptions to these findings with the Board, the Court is without jurisdiction to review them under Section 10(e) of the Act. *See* 29 U.S.C. § 160(e) (noting that the Court may not consider any "objection that has not be been urged before the Board, its member, agent or agency," absent extraordinary circumstances); *Wolke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (noting that "the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board").

CBT also does not challenge these findings in its opening brief to the Court. Nor does CBT challenge the appropriateness of the Board's Order to remedy those violations. Accordingly, CBT has waived any defense it may have to them, thereby entitling the Board to summary enforcement of those portions of its Order remedying the uncontested violations. *See, for example, NLRB v. Springfield Hospital*, 899 F.2d 1305, 1308 (2d Cir. 1990) (uncontested violations of the Act

summarily enforced); *NLRB v. State Plate Color Service*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988) (same).

Moreover, the admitted violations do not disappear by not being raised. Rather, "[i]t is against the background of acknowledged violations that [the Court] consider[s the Board's remaining] findings." *Torrington Extend-A-Care Employees Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994) (summarily enforcing uncontested findings where employer waived right to raise issues by failing to contest them in opening brief) (citing *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67-68 (2d Cir.1992)). *Accord NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982) (uncontested violations "remain, lending their aroma to the context in which the [contested] issues are considered").

As to the period leading up to Rodriguez's March 19, 2003 testing, CBT does not challenge the Board's findings that it violated Section 8(a)(1) and (3) by committing the following unfair labor practices:

- Coercively interrogating TDU activist employee Jose Estevez about who was behind the petition for a new shop steward election (JA 23 n.4);
- Threatening Estevez with discharge (JA 23 n.4);
- Threatening to have TDU activist employees arrested for engaging in union activities (JA 23 n.4);
- Threatening TDU activist Jona Fleurimont with unspecified reprisals (JA 23 n.4);

- Issuing three written warnings to Fleurimont on June 5, 2002 (JA 23 n.4);
- Singling out TDU activist employees Jose Guzman and Fleurimont for discipline by their September 30, 2002 suspensions (JA 23 n.4);
- Suspending Guzman on November 21, 2002 (JA 23 n.4);
- Subjecting TDU activist employees to closer supervision by following and videotaping them on their routes (JA 23 n.4);
- Following and issuing a written warning to Rodriguez on February 14, 2003 (JA 23 n.4); and
- Singling out Rodriguez for testing on March 19, 2003 (JA 23 n.4).

In addition to those findings, CBT did not except to the judge's conclusion that, on March 24, 2003--just 3 days before it discharged Rodriguez--it violated Section 8(a)(1) of the Act by interrogating, threatening, creating the impression of surveillance and engaging in surveillance of Rodriguez and other TDU activist employees, who, on March 21, 2003, had visited and complained to the DOE about their working conditions. (JA 23 n.4.)

Because CBT failed to file exceptions to these findings before the Board, the Court has no jurisdiction to consider them. The Board is therefore entitled to summary enforcement of those portions of its Order remedying the uncontested violations. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311-12 & n.10 (1979). *Accord KBI Security Service, Inc., v. NLRB*, 91 F.3d 291, 294 (2d Cir. 1996); *NLRB v. Springfield Hospital*, 899 F.2d 1305, 1308 (2d Cir. 1990).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CBT VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE JUAN CARLOS RODRIGUEZ IN RETALIATION FOR HIS UNION AND PROTECTED CONCERTED ACTIVITIES

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) proscribes employer "discrimination with regard to hire or tenure of employment or any term or condition of employment . . . to encourage or discourage membership in any labor organization . . . ." *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401-03 (1983); *NLRB v. G&T Terminal Packaging*, 245 F.3d 103, 115-16 (2d Cir. 2001). As shown below, the Board reasonably found that, in addition to the host of admitted discriminatory acts against employee Rodriquez noted above, CBT unlawfully discharged Rodriquez in violation of Section 8(a)(3) and (1) of the Act.[5] Because CBT's sole procedural defense has no merit, the Court should enforce this aspect of the Board's Order.

After its employees contacted TDU and began to speak out about electing a new shop steward who would handle their workplace grievances more effectively, CBT admittedly engaged in a host of unfair labor practices directed at the TDU dissidents. Thus, CBT engaged in coercive interrogation to uncover the instigators

[5] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(3) of the Act therefore results in a "derivative" violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) ("[A] violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1).").

behind the petition for the shop steward election, and threatened to have those activist employees discharged and arrested. (JA 33, 40; 721-24, 749.) When lead TDU activist Rodriguez, undaunted by CBT's threats, openly collected both funds for discharged employee Fleurimont and signatures for a petition alleging that Fleurimont's discharge was unlawful, CBT focused its guns on Rodriguez.

As the Board observed (JA 25), it is undisputed that Rodriquez's discharge was the "direct result of [CBT's] unlawful actions." Specifically, in the absence of exceptions before the Board (JA 23 n.4), CBT conceded that it unlawfully followed and videotaped Rodriguez while he was driving his route, and then illegally penalized him with a fake safety warning. CBT similarly conceded in the absence of exceptions (JA 23 n.4) that, on the basis of that manufactured warning, it unlawfully singled Rodriguez out for testing only 5 months after he had successfully passed the state's biennial driving test. CBT's pattern of harassment against Rodriguez for his TDU activity resulted in his failing two 19A tests, rendering him "disqualified" to drive a school bus under New York law. CBT admitted in its answer to the complaint that, on the day of the "disqualification," it "discharged its employee[] Juan Carlos Rodriguez." (JA 71 ¶ 13(a), 74 ¶ 1; *see also* JA 24 & n.6.) In this light, the Board reasonably found that "Rodriquez's discharge, despite his disqualification from driving, would not have taken place in the absence of his protected activities." (JA 25.)

Before the Court, CBT does not contest, and therefore has waived any challenge to, the Board's finding that, "by unlawfully singling out Rodriquez for testing, [CBT] orchestrated the circumstances leading to Rodriquez's premature disqualification from driving," and, therefore, to his discharge. (JA 25.) Instead, CBT grasps onto a single procedural argument, claiming that its admission (JA 71 ¶ 13(a), 74 ¶ 1) that it discharged Rodriguez for failing the tests should be disregarded. Rather, argues CBT, Rodriguez was not discharged, but merely *temporarily disqualified* from work. Under CBT's theory, presumably, Rodriquez could have come back to work as soon as he removed his temporary disqualification, and, therefore, he was not "discharged" within the meaning of the Act. That argument must fail, however, because CBT is bound by its initial admission under Board law; Federal Rule of Civil Procedure 15(b), on which CBT relies, does not allow it to escape its concessionary pleading; and, in any event, the distinction between disqualification and discharge is of no moment under the circumstances here.

1. To begin, the Board did not abuse its discretion in binding (JA 24 n.6) CBT to its answer's admission (JA 71, 74) that, "[o]n or about March 27, 2003, [CBT] discharged its employee[] Juan Carlos Rodriguez." It is well settled that "a party is bound by the admissions of his pleadings." *Best Canvas Products & Supplies v. Ploof Truck Lines*, 713 F.2d 618, 621 (11th Cir. 1983). *Accord Brown*

v. Tennessee Gas Pipeline Co., 623 F.2d 450, 454 (6th Cir. 1980) ("Under federal law . . . admissions in the pleadings are generally binding on the parties and the Court."). Thus, the Board has consistently held that "[s]uch an admission has the effect of a confessionary pleading, and its principal characteristic is that it is conclusive on the party making it." *Boydston Electric, Inc.*, 331 NLRB 1450, 1451 (2000). *Accord Steelworkers, Local Union 14534 v. NLRB*, 983 F.2d 240, 247 (D.C. Cir. 1993); *C.P. Associates, Inc.*, 336 NLRB 167, 167 (2001); *cf. Scott v. Commissioner*, 117 F.2d 36, 40 (8th Cir. 1941) ("Admissions in the pleadings . . . are in the nature of judicial admissions binding upon the parties, unless withdrawn or amended.").

Thus, CBT's claim that the Board erred in holding it to its admission is unpersuasive.[6] In this regard, the Board's decision in *Boydston Electric, Inc.*, 331 NLRB 1450 (2000), is both pertinent and instructive. In *Boydston*, the employer

[6] CBT's defense (Br. 15 n.5, 16) that the admission was made by its former counsel has no merit. Although CBT's former counsel submitted its answer on September 3, 2003, CBT's current counsel, Michael J. Mauro and Richard I. Milman, represented CBT after the post-pleading state and, at no time did they seek to retract or amend that admission as they were permitted to do under Section 102.23 of the Board's Rules and Regulations. Nor do they now provide any explanation for CBT's failure to deny in its answer the allegation that it discharged Rodriguez on or about March 27, 2003. *Cf. K&W Trucking, Inc.*, 215 NLRB 127, 128 (1974) (Board rejected employer's post-hearing reconsideration motion based, in part, on employer's assertion that its attorney was under a mistaken impression that it was engaged in interstate commerce). In sum, CBT's admission in its answer remains binding, and it is too late, at this point in the proceeding, for CBT to seek to litigate a matter thus admitted. *See Steelworkers, Local Union 14534 v. NLRB*, 983 F.2d at 247; *Liberty Natural Products*, 314 NLRB at 630.

unlawfully suspended the discriminatee, mined his original job application for problems, and then instructed him not to return to work until he verified certain information on the application. *Id.* at 1451. The employee never returned to work. *Id.* Although the employer admitted in its answer to the complaint that it discharged the employee as alleged, the administrative law judge found that the employee's employment discontinued because he failed to return to the job with the requested information, not because the employer discharged him. *Id*. Accordingly, the judge concluded that it "would be unjust to find discharge based on the answer when the evidence was to the contrary." *Id.* The Board rejected the judge's analysis, holding instead that the employer's admission in its answer that it discharged the employee was binding. *Id.* The Board underscored the importance of holding parties to the confessions in their pre-hearing pleadings, noting that judges, the Board, and the parties rely on the complaints and the answers to determine the contested issues. *Id*.

Here, as in *Boydston*, CBT suspended Rodriguez on March 19, 2003, and, on March 27, 2003, CBT told Rodriguez that to regain his employment he must obtain recertification by the State Department of Motor Vehicles. As with the employee in *Boydston,* Rodriguez never returned to CBT's workplace. And, as with the employer in *Boydston,* CBT admitted in its answer that, as alleged in the complaint, its actions in requiring Rodriquez to seek recertification constituted

Rodriguez's discharge. Accordingly, there is no question that CBT discharged Rodriguez. *See Liberty Natural Products,* 314 NLRB 630, 630 (1994) (where answer admits complaint allegation that individual is a supervisor, General Counsel can rely on admission and does not need to litigate that issue), *enforced,* 73 F.3d 369 (9th Cir. 1995); *accord Academy of Arts College*, 241 NLRB 454, 455 (1979), *enforced*, 620 F.2d 720 (9th Cir. 1980).

Also instructive is the D.C. Circuit's decision in *Steelworkers, Local Union 14534 v. NLRB*, 983 F.2d 240 (D.C. Cir. 1993). In that case, the employer admitted an allegation in the complaint that striking employees, through the union, had made an unconditional offer to return to work. *Id.* at 247. The Board found that the employer's failure and refusal to reinstate the strikers was unlawful. *Id*. On review, the employer attempted to retract its admission by arguing that, because the strikers repeatedly told it that they would return to work only if they were all immediately reinstated, the Board erred in finding that the offer to return to work was unconditional. *Id*. The court rejected the employer's argument, holding that the employer's admission in its answer "took this issue out of the case." *Id.* Here, as in *Steelworkers*, CBT's admission that it discharged Rodriguez has removed that issue from the case.

2. CBT next attempts to escape the binding effect of its concessionary pleading by invoking Federal Rule of Civil Procedure 15(b), which provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise the issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of those issues.

Thus, CBT argues *ad nauseam* (Br. 16-28) that, because evidence adduced at the hearing reveals that Rodriguez was merely temporarily disqualified from driving a school bus, its confessionary pleading must be deemed amended pursuant to Rule 15(b).

As an initial matter, the Board is required to apply Rule 15(b) only "so far as practicable" to Board proceedings. *See* Section 10(b) of the Act (29 U.S.C. § 10(b)); *NLRB v. Local 138, Operating Engineers*, 380 F.2d 244, 253 (2d Cir. 1967) (citing *Frito Co., Western Div. v. NLRB*, 330 F.2d 458, 465 (9th Cir. 1964)).[7] As the courts of appeals have recognized, the responsibility for the administration of the Act lies exclusively with the Board, and so long as the Board's procedural methods do not violate constitutional restraints, the right to choose the method is the Board's. *See NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 47 (3d Cir. 1942) (courts "may not dogmatically tell the Board" that it must conduct its proceedings "in some one particular manner"). This time-tested admonition is particularly applicable, where, as here, there is no claim that the procedure actually

[7] *See also* 29 C.F.R §§ 101.10, 101.16 (essentially repeating the quoted language of Section 10(b) of the Act (29 U.S.C. § 10(b)).

followed by the Board deprived CBT of due process. *Cf. Morgan v. United States*, 304 U.S. 1, 18 (1936).

The Board's rules specifically allow parties to amend their answers, but require, unlike Rule 15(b), parties to do so by motion.[8] It is undisputed that CBT made no such motion during the hearing below. That simple fact distinguishes the single case where this Court applied Rule 15(b) to Board proceedings. There, the aggrieved party explicitly moved during the hearing (pursuant to the Board's rules) to amend its answer's general denial to specifically set forth the level of specificity the Board requires in backpay cases. *See Local 138, Operating Engineers*, 380 F.2d at 253-54.

Even if Rule 15(b) applies because the General Counsel failed to object to evidence adduced at the hearing that Rodriguez's test failure resulted in disqualification, the introduction of potentially conflicting post-pleading evidence is not dispositive, nor does it negate the binding effect of CBT's admission. For

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[8] Section 102.23 of the Board's Rules and Regulations provides that:

> The respondent may amend his answer at any time prior to the hearing. During the hearing or subsequent thereto, he may amend his answer in any case where the complaint has been amended, within such period as may be fixed by the administrative law judge or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the administrative law judge or the Board, *upon motion*, be amended upon such terms and within such periods as may be fixed by the administrative law judge or the Board.

29 C.F.R. § 102.23 (emphasis added).

instance, in *Lucas v. Burnley,* 879 F.2d 1240 (4th Cir. 1989), the Fourth Circuit considered and rejected Rule 15(b) arguments similar to CBT's in the instant case. The employer in *Lucas* attempted to invoke Rule 15(b) to void the effectiveness of its admission that a certain certificate was a prerequisite to selection for a job, citing plaintiff's trial testimony to the contrary. 879 F.2d at 1243. The court, however, held that the plain language of Rule 15(b), which speaks to "issues not raised by the pleadings," precludes the rule's application because the certificate requirement issue was not only raised by the pleadings, but also admitted and resolved by those pleadings. *Id*. In so holding, the court rejected the employer's proposal to adopt a blanket rule--similar to CBT's argument here--that a failure, during the trial, to object to evidence contrary to an admission in the answer constitutes implied consent to try the issue that had already been admitted in the pleadings. As the court observed, "had the Federal Rules been intended to make the binding nature of a judicial admission so easily waivable, they would certainly contain a much more explicit provision than 15(b)." *Id*.

As in *Lucas,* CBT's invocation of Rule 15(b) must fail. To reiterate, Rodriguez's discharge was not only alleged in the complaint, but it was also admitted to by CBT in its answer.[9] The Court should reject CBT's flip-flop on its

[9] The evidence on which CBT relies to prove that Rodriguez's disqualification was tried by implied consent without objection by the General Counsel cannot be viewed as reopening the question of whether Rodriguez was discharged. To the

admission that Rodriquez's disqualification constituted a legal discharge. *Cf. Bright v. QSP, Inc.*, 20 F.3d 1300, 1305 (4th Cir. 1994) (noting that, "even if post-pleadings evidence conflicts with evidence in the pleadings, admissions made in pleadings are binding"); *Missouri Housing Development v. Brice*, 919 F.2d 1306, 1314-15 (8th Cir. 1990) (even if post-pleading evidence conflicts with admissions in pleadings, admission in pleadings are binding on the party and may support summary judgment against the party making such admission) (citations omitted).

3. In any event, even if CBT's answer had denied the allegation that it discharged Rodriquez on March 27, its claim that Rodriguez was disqualified rather than discharged is of no moment. Rodriquez's "disqualification"--the direct result of CBT's unlawful pattern of harassment against Rodriquez, the contrived safety violation, and the discriminatory "singling out" for testing (all of which the Company has not contested, either before the Board or the Court)--would have violated the Act even if it did not constitute a "discharge." In such a case, even if Rodriquez had been told that CBT was only temporarily suspending him pending his recertification, the same remedy would result: Backpay until the next

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contrary, the General Counsel may have declined to object to the introduction of that evidence for many reasons: He could have allowed it in simply to tell Rodriquez's entire story, he could have believed that it came in to address CBT's (presumably meritless) affirmative defense, or he could have logically believed that the evidence was irrelevant but harmless, given that CBT admitted in its answer that the severance of employment that occurred on March 27, 2003 constituted a "discharge."

regularly-scheduled 19A test with concurrent duty to mitigate damages and conditional reinstatement. Indeed, the Board specifically stated that its make whole order here remedied the unchallenged singling out--which would still stand, even if Rodriquez had not been "legally" discharged--as well as the discharge that resulted. (JA 26.) There is no reason to think that mere "disqualification" would have garnered any other remedy.[10]

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING A CONDITIONAL REINSTATEMENT AND LIMITED BACKPAY REMEDY FOR RODRIGUEZ

The Board found that CBT unlawfully discharged Rodriguez for failing the March 19 and 27, 2003 19A tests, and ordered CBT to offer Rodriguez

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[10] Moreover, even if CBT had not admitted that Rodriquez's March 27, 2003 separation of employment constituted a discharge, it is still quite possible that the Board would have found the disqualification to amount to a constructive discharge, had the Board reached the issue. Indeed, after CBT conducted its aggressive campaign to get rid of him--which included unlawfully following him as he drove his route and manufacturing excuses to cite him with a safety violation, unlawfully suspending him for union activity, unlawfully singling him out for testing because of his union activity, unlawfully interrogating him, and engaging in a host of other coercive acts against TDU supporters--Rodriquez would reasonably have understood the disqualification to be nothing but a discharge, despite any assurances to the contrary. As then-Judge Blackmun wrote: "The fact of discharge of course does not depend on the use of formal words of firing. It is sufficient if the words or action of the employer 'would logically lead a prudent person to believe his tenure had been terminated.'" *NLRB v. Trumbull Asphalt Co. of Del.*, 327 F.2d 841, 843 (8th Cir. 1964), *cited in NLRB v. Future Ambulette*, 903 F.2d 140, 144 (2nd Cir. 1990). *Accord Kaynard for and on Behalf of NLRB v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980) ("The effect, not the particular form, of the language used by the employer determines whether an employee has been discharged.").

reinstatement, contingent upon his demonstration that he reestablished his 19A certification within a reasonable time of the offer. The Board's Order also requires CBT to pay Rodriguez limited backpay from March 27, 2003, the date of his discharge to October 31, 2004, the first date when he would have been required to take a 19A test but for CBT's unlawfully administering 19A tests to Rodriguez nearly 7 months early. As now shown, in carefully fashioning this conditional reinstatement and limited backpay remedy, the Board specifically sought to promote the policies of both the Act and New York State authorities.

A. Applicable Principles

Section 10(c) of the Act (29 U.S.C. § 160(c)) authorizes the Board to fashion appropriate remedial orders to alleviate the effects of unfair labor practices. "[U]pon finding that an employer has committed an unfair labor practice," the Board may direct the violator to "to take affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies of [the] Act." *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). *Accord NLRB v. J. H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 262-63 (1969); *NLRB v. Fugazy Continental Corp.*, 817 F.2d 979, 982 (2d Cir. 1987). One remedy that plays a critical role in the scheme of the Act is "an order requiring reinstatement and backpay" for employees who have been unlawfully discharged. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973). The objective of

such a remedy is to restore, as far as possible, the status quo that would have been obtained but for the wrongful act. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). *Accord Fugazy Continental Corp.*, 817 F.2d at 982 (a reinstatement and backpay order is "designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice," and to "guard against rewarding an employer for his own misconduct") (citing *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952)). *See also Master Iron Craft Corp.*, 289 NLRB 1087, 1087 (1988), *enforced*, 898 F.2d 138 (2d Cir. 1990).

B. The Board's Conditional Reinstatement and Limited Backpay Orders Are Appropriate Exercises of the Board's Affirmative Remedial Authority

The Board reasonably exercised its broad remedial authority in ordering (JA 26) CBT to offer Rodriguez conditional reinstatement to his prior position, contingent upon his demonstrating that he reestablished his 19A certification within a reasonable time of the offer, and to pay him backpay. As to the reinstatement portion of the remedy, the Board specifically recognized (JA 26) that Rodriguez's ability to regain his certification and, thus, qualify for reemployment as a school bus driver, is a matter solely within the jurisdiction of the New York State authorities. Accordingly, the Board held (JA 26) that it would not order CBT to reinstate Rodriguez until he is able to regain his 19A certification. As the Board

further observed (JA 26), conditional reinstatement remedies have been awarded in similar unlawful discharge cases when reinstatement would require the removal of a legal disability. *See, e.g., De Jana Industries, Inc.*, 305 NLRB 845, 852 (1991) (reinstatement of employee to truck driver position conditioned on employee's establishing that he has a valid driver's license). That remedy has received the imprimatur of this Court. *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990) (enforcing conditional reinstatement order for a driver whose license had been suspended, upon presentation of a valid license).

Likewise, based on its finding that CBT unlawfully discharged Rodriguez on March 27, 2003, the Board ordered (JA 26) CBT to make Rodriguez whole from the date of his discharge, to October 31, 2004, the date when he would have been required to seek 19A recertification. The Board explicitly noted that Rodriquez was entitled to backpay only "to the extent he . . . mitigate[d] his damages." (JA 26.) This limited backpay order is a reasonable exercise of the Board's affirmative remedial power, specifically designed to make Rodriguez whole only for losses he suffered on account of CBT's unfair labor practices. *See Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188-89 (1973); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965).

C. CBT's Defenses Ignore the Special Characteristics of the Board's Remedial Order and the Direct Link Between the Unlawful Acts and Rodriquez's Disqualification

CBT raises two general challenges to the Board's remedial order. First, it cites this Court's decision in *NLRB v. Future Ambulette*, 903 F.2d 140 (2d Cir. 1990), in arguing that the Board's backpay order encourages CBT to offer Rodriguez reinstatement in contravention of New York State law and discourages Rodriquez from mitigating his damages. Its next argument is that the Board's recent decision in *Anheuser-Busch*, 351 NLRB No. 40, 2007 WL 2948434 (2007), precludes both the reinstatement and backpay segments of the Board's Order in the instant case because Rodriguez was discharged "for cause." CBT's arguments ultimately fail for the same reason that the Board is entitled to enforcement on the merits: CBT has not even attempted to address the Board's uncontested finding that, but for CBT's unlawful conduct, Rodriguez's employment would not have been terminated.

First, CBT's reliance (Br. 46-47) on *Future Ambulette* is misplaced. In that case, the Court refused to enforce the Board's backpay order, finding that ordering reinstatement of an unlicensed driver contingent on his relicensing encouraged the employer to reinstate him prematurely to reduce its backpay obligation, in conflict with state licensing laws. 903 F.2d at 145. Moreover, the Court concluded that, because the Board required conditional reinstatement, or, alternatively,

reinstatement to a substantially equivalent position, it eliminated the employee's incentive to mitigate damages by seeking relicensure and potentially required the employer to reinstate him to a job he never held. *Id.* In that light, the Court refused to enforce the Board's backpay order. *Id.*

Here, the Board tailored its backpay order to avoid *Future Ambulette*'s pitfalls. First, CBT incorrectly claims (Br. 46-47) that the Board's reinstatement order "pressures" it to "abandon" New York State's Vehicle and Traffic 19A test requirements and "rehire Rodriguez without being properly qualified to drive a school bus." To the contrary, the Board's order contains none of the incentives this Court found troublesome in *Future Ambulette*. *See* 903 F.2d at 145. To wit, unlike *Future Ambulette*, the Board here specifically required Rodriquez to mitigate his backpay during the limited backpay period. (JA 26.) Moreover, Rodriquez has a strong incentive to mitigate his backpay, given that the Board ordered only reinstatement to a driving position, not to any substantially equivalent position, and only after Rodriguez obtained state recertification. (JA 26.) Thus, CBT will have no inducement to reinstate Rodriquez prematurely, and Rodriquez has every motivation to mitigate his damages.

Equally lacking is CBT's contention (Br. 48) that the Board's backpay order is, like *Future Ambulette*, "open-ended because it leaves it up to Rodriguez whether to take an additional 19A road test to become re-qualified to drive a

school bus, whether to seek reinstatement or whether to seek substantial employment elsewhere." The Board's Order neither explicitly nor implicitly gives Rodriguez the power to keep the backpay period running. Indeed, the Board emphasized (JA 26) that Rodriguez's reinstatement should be "contingent upon his demonstrating that he has reestablished his 19A certification, within a reasonable time of the offer," which "will be determined in compliance."

Thus, to the extent that the backpay period remains open-ended, the onus is on CBT to toll its backpay liability by offering Rodriguez reinstatement and triggering Rodriquez's duty to prove his recertification, something which CBT has yet to do. It is settled that an employer must make an offer of reinstatement to unlawfully discharged employees, and only such an offer will toll the employer's liability of backpay. *See Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1056 (D.C. Cir. 1989); *Tony Roma's Restaurant*, 325 NLRB 851, 852 (1998); *Lipman Bros.*, 164 NLRB 850, 853 (1967). Further, as noted above, the Board's Order provides good incentives for Rodriquez to mitigate his damages and seek recertification.

There is likewise no merit to CBT's contention (Br. 41-46) that Rodriguez is not entitled to reinstatement or backpay even if he was unlawfully discharged. To support this spurious claim, CBT relies (Br. 41-46) on the Board's decision in *Anheuser-Busch*, 351 NLRB No. 40, 2007 WL 2948434, at *3-*4 (2007).

However, contrary to CBT's claim, the instant case and *Anheuser-Busch* are distinguishable.

In *Anheuser-Busch*, on remand from the District of Columbia Circuit,[11] the Board addressed whether it effectuated the policies of the Act to give make-whole relief to employees discharged for drug use discovered only after the employer unlawfully installed hidden video cameras. 2007 WL 2948434, at *2 (2007). The Board held that Section 10(c) of the Act, 29 U.S.C. § 160(c)--which prohibits the Board from reinstating employees discharged "for cause"--precluded granting a make-whole remedy to employees disciplined for misconduct uncovered through unlawful means. *Id*. at *4-*5 (citations omitted). The Board's holding turned on the fact that the reason for the employees' discipline or discharge was not that the employees engaged in union or other protected activities. *Id.* at *5. Rather, the Board noted that the employees were disciplined for actions that the employer legitimately considered to be misconduct, *i.e.*, the discharge or suspension was "for cause." *Id.*

Here, in contrast to *Anheuser-Busch*, there is not a scintilla of evidence that Rodriguez ever engaged in any unlawful conduct or that he was discharged for cause. Indeed, the Board in *Anheuser-Busch* explicitly found situations like this inapposite, distinguishing cases where "it is not clear whether the employees'

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[11] *Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 46-49 (D.C. Cir. 2005).

actions would have been wrongful or would have merited the discipline imposed--that is, whether the employees' actions would have constituted 'cause' for discipline--if the employer had not committed the unfair labor practices." 2007 WL 2948434, at *6.[12] Unlike in *Anheuser-Busch*, the record amply shows a significant nexus between CBT's uncontested unfair labor practice of singling out Rodriguez for testing on March 19 and 27, 2003, and his discharge. Accordingly, CBT's argument (Br. 48-49) that Rodriguez's failure of his 19A test is tantamount to the employee misconduct in *Anheuser-Busch* is simply preposterous. For, it attempts to avoid the gravity of the Board's uncontested finding (JA 26), that were it not for CBT's unlawful manipulation of the testing schedule Rodriguez would not have been discharged. Therefore, CBT grasps at straws by contending (Br. 54) that Rodriguez's failure of his tests was analogous to the "for cause" reasons that warranted the discharges in *Anheuser-Busch*.

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[12] CBT relies (Br. 50) on this language to distinguish the Board's decision in *Kidde, Inc.*, 294 NLRB 840, 848-49 (1989), which the Board relied upon below (JA 25). Yet, the Board's language explains exactly why *Kidde, Inc.* is directly on point: In both *Kidde, Inc.* and the instant case, the employee misconduct would not have been discovered unless the employer targeted that employee for scrutiny because of his protected activity. As the Board observed in *Kidde*, "[e]mployee misconduct, discovered only because of an investigation prompted by the employee's protected activity, cannot serve as a lawful basis for discipline." 294 NLRB at 850. The Board confirmed that principle in the *Anheuser-Busch* language quoted above. For the same reasons, the Board's decision in *Taracorp Industries*, 273 NLRB 221, 221 (1984), provides CBT no refuge. (*See* Br. 51-52 (relying on *Taracorp*).)

In sum, CBT's proffered defenses find no support in the case law, nor are they supported by any probative evidence, either in general, or concerning employee Rodriguez. The Board's conditional reinstatement and backpay order, therefore, is a proper remedy that follows directly from its finding that absent CBT's anger over Rodriguez's union and protected concerted activities he would still be working for CBT.

CONCLUSION

For the foregoing reasons, the Board respectfully asks that the Court enter judgment denying CBT's petition for review and enforcing the Board's Order in full.

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[H:CBT final brief-#FJJH]

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FOR THE SECOND CIRCUIT

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	)	
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v.	)	
	)	Board Case Nos.
CONSOLIDATED BUS TRANSIT, INC.	)	2-CA-34661 et al
	)	
Respondent/Cross-Petitioner	)	

COMBINED CERTIFICATES

As required under the Federal Rules of Appellate Procedure, combined with Local Rules 25, 28, and 32, Board counsel makes the following certifications:

COMPLIANCE WITH TYPE-VOLUME REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 10,400 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the .pdf file containing a copy of the Board's brief that was sent by e-mail to the Court is identical to the hard copy of the Board's brief filed with the Court and served on petitioner, and were scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (7/1/200 rev. 3), and according to that program, are free of viruses.

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Dated at Washington, DC
this 2nd day of July, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this day sent to the Clerk of the Court by e-mail to agecncycases@ca2.uscourts.gov, and first-class mail the required number of copies of the Board's brief in the above-captioned case and has served two copies of that brief by first class mail upon the following counsel at the address listed below.

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this 2nd day of July, 2008